**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **DONALD L. GILLASPIE**<br>Claimant | ) | |
| VS. | ) | Docket No. **1,035,870** |
| **ST. JOHN HOSPITAL, INC.**<br>Self-Insured Respondent | ) | |

## ORDER

Claimant requested review of the November 3, 2008 Award by Administrative Law Judge Marcia L. Yates Roberts. The Board heard oral argument on February 10, 2009.

### APPEARANCES

John G. O'Connor of Kansas City, Kansas, appeared for the claimant. Gregory D. Worth of Roeland Park, Kansas, appeared for the self-insured respondent.

### RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

### ISSUES

The claimant, a part-time employee, suffered injuries in a fall at work. The claimant's average gross weekly wage was disputed. The Administrative Law Judge (ALJ) found, pursuant to K.S.A. 44-511(b)(5), that claimant's gross amount of money earned during the 26 weeks immediately preceding the date of accident should be divided by 26 weeks which resulted in an average gross weekly wage of $252.27.

Claimant requests review and argues the ALJ erred in the computation of his average gross weekly wage. Claimant agrees that he was a part-time employee of respondent and computation of his average gross weekly wage is to be determined pursuant to K.S.A. 44-511(b)(5). But claimant argues the ALJ should have divided his gross amount of money earned by 18 weeks rather than 26 weeks to yield an average gross weekly wage of $364.38. Claimant further argues that, because he would work 7 days and then be off work for 7 days, the weekly periods he did not work should not be

included in the divisor of his gross earnings in the 26 weeks immediately preceding the date of accident.

Respondent argues that K.S.A. 44-511(b)(5) provides that the gross earnings during the calendar weeks employed is divided by 26 and the claimant worked during each calendar week of the 26 weeks preceding his date of accident. Respondent further argues that claimant failed to meet his burden of proof, as required by K.S.A. 44-511(b)(5), that any of the alleged workweeks when he had no earnings were due to vacation, leave of absence, sick leave, illness, or injury. Consequently, the respondent requests the Board to affirm the ALJ's Award.

The sole issue for Board determination is the amount of claimant's average gross weekly wage.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Donald Gillaspie worked as a part-time security officer for respondent. His duties also included performing maintenance work. He was paid $13.42 an hour and scheduled to work 32.5 hours biweekly. His workweek varied but occasionally he would work seven consecutive days and then be off work for seven consecutive days. His scheduled workweek generally started on Wednesday. In the 26 weeks before his date of accident there were 8 weeks that after working for 7 consecutive days, Wednesday through Tuesday of the following week, that Gillaspie was then off work for 7 consecutive days.

K.S.A. 44-511(b)(4)(A) provides that the average gross weekly wage for a part-time hourly employee shall be determined in the manner provided in K.S.A. 44-511(b)(5) which provides in pertinent part:

> (5) . . . and if the employee has been employed by the employer at least one calendar week immediately preceding the date of the accident, the average gross weekly wage shall be the gross amount of money earned during the number of calendar weeks so employed, up to a maximum of 26 calendar weeks immediately preceding the date of the accident, divided by the number of weeks employed, or by 26 as the case may be . . . . In making any computations under this paragraph (5), workweeks during which the employee was on vacation, leave of absence, sick leave or was absent the entire workweek because of illness or injury shall not be considered."

Claimant argues that the weeks he did not work because he was not scheduled to work are not to be included in calculating the average weekly wage of a part-time

employee. Claimant relies on language in *Osmundson*[1] to support his contention. In *Osmundson* the issue was whether the weeks when there was no work available to perform and he was drawing unemployment benefits should be used in computing his average weekly wage.

The *Osmundson* case is distinguishable. *Osmundson's* earnings were determined by his output, not an hourly rate of pay. Moreover, *Osmundson* was a seasonal employee and the issue was whether the time when he received unemployment compensation should be included in the number of weeks used as the divisor in determining average weekly wage. Initially, it must be noted that claimant was a part-time employee. Here, claimant was employed and the reason he did not work was simply because as a part-time employee his hours were limited.

In *Elder*[2], the Supreme Court interpreted K.S.A. 44-511(b)(5) in the following fashion:

> Claimants contend the statue requires that the eight weeks when the deceased employee did not work be excluded from the computation of his average weekly wage. Claimants initially argue that 44-511(b)(5) requires that any week when the worker is absent the entire week and performs no work, regardless of the reason for his or her absence, shall not be considered in the computation of average weekly wage. This particular argument is without merit. The statute clearly states that for the exclusion to apply, the absence must be due to vacation, leave of absence, sick leave, illness, or injury.

As a part-time employee claimant's work schedule was limited and his workweeks were arranged to provide 32.5 hours biweekly. As noted in *Elder,* for the weeks to be excluded from the computation of the average gross weekly wage, the absence from work must be due to vacation, leave of absence, sick leave, illness, or injury. In this case the time claimant did not work was simply because of his unique work schedule as a part-time employee. The claimant did not meet his burden of proof to establish that his absences were due to vacation, leave of absence, sick leave, illness, or injury as required by the statute.

In applying the Supreme Court's logic in *Elder*, the Board finds that, while claimant was not working for periods of time, nonetheless, he was not on a leave of absence, as the performance of claimant's duties for respondent and the remuneration by respondent were not "suspended." The Board affirms the ALJ's determination that claimant's average gross weekly wage was $252.27.

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[1] *Osmundson v. Sedan Floral, Inc.*, 10 Kan. App. 2d 261, 697 P.2d 85, (1985).

[2] *Elder v. Arma Mobile Transit Co.*, 253 Kan. 824, 827, 861 P.2d 822 (1993).

## AWARD

**WHEREFORE**, it is the decision of the Board that the Award of Administrative Law Judge Marcia L. Yates Roberts dated November 3, 2008, is affirmed.

**IT IS SO ORDERED.**

Dated this 31st day of March 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: John G. O'Connor, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent
Marcia L. Yates Roberts, Administrative Law Judge